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No. 1586

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE WILLIAMSBURGH CITY FIRE INSURANCE
COMPANY (a Corporation),

Plaintiff in Error,

vs.

LEON WILLARD, Doing Business Under the Firm
Name of LEON WILLARD & COMPANY,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court,
for the Northern District of California.

FILED

APR 25 1908

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In the Superior Court of the City and County of San Francisco, State of California.

LEON WILLARD, Doing Business Under the Firm Name of LEON WILLARD & CO.,

Plaintiff,

vs.

WILLIAMSBURGH CITY FIRE INS. COMPANY
(a Corporation),

Defendant.

Complaint in Superior Court.

Plaintiff complaining of defendant for cause of action alleges and says: -

I.

That plaintiff is and was at all times herein mentioned engaged in mercantile business under the name of Leon Willard & Co., said name being a name used by him for business purposes.

II.

That at all times herein mentioned the defendant was and is a corporation duly organized and existing under and by virtue of the laws of the State of New York.

III.

That heretofore, to wit, on the 29th day of September, 1905, the defendant made, executed and delivered to plaintiff a written policy of fire insurance numbered 2765082, wherein and whereby said defendant insured said plaintiff against loss and damage by fire to the amount of twenty-five hundred

(\$2500.00) dollars upon certain property, to wit: On stock of fancy goods, laces, cloaks, wraps, perfumery and other similar merchandise, their own, or held by them in trust or on commission, sold but not delivered, all while contained in the brick building situate #738 North side of Mission Street, between 3d and 4th Streets, San Francisco, Calif., with loss payable to said Leon Willard, it being stipulated in said policy of insurance that it was then and there understood that said Leon Willard was doing business under the name of Leon Willard & Co. That the period during which said policy of insurance was to run was stated therein to be from the 29th day of September, 1905, to and including the 29th day of September, 1906.

IV.

That thereafter, to wit, on the 18th day of April, 1906, the said property so insured as aforesaid was destroyed by fire. That at the time of the said fire the total insurances carried on said property was the sum of twenty-five hundred (\$2500.00) dollars, being the amount of said policy and no more. That no other policies of insurance were carried upon said property by plaintiff.

V.

That immediate notice of the fire was given to the defendant corporation by plaintiff in writing, to wit, on or about the 20th day of April, 1906.

VI.

That thereafter, to wit, on the 16th day of June, 1906, plaintiff duly executed, subscribed and swore to a written statement setting forth his knowledge

and belief as to the time and origin of the fire, his interest in the property, cash value of each article, and the amount of loss claimed thereon; by whom and for what purposes the building described therein and the several parts thereof were occupied at the time of the fire, and any and all information required by the terms of said policy of insurance; and on said day delivered to said defendant the said statement. That at the time of the fire aforesaid, plaintiff was the sole owner of the property insured and no other person had any interest therein; that there were no encumbrances thereon and there had been no changes in the title, use, location, possession or exposure of said property since the issuing of said policy.

V.

That no disagreement whatsoever has taken place between plaintiff and defendant as to the amount of loss under said policy of insurance; but defendant on the 9th day of July, 1906, refused to recognize liability under said policy of insurance, refused to adjust, investigate or negotiate as to the amount of loss or as to any matter or thing in connection therewith, and has ever since continued to refuse and does now refuse to pay the said loss or to investigate or adjust the same; and said policy of insurance has not been paid nor has said loss been adjusted or paid; but each and all of the refusals and repudiations aforesaid upon the part of said defendant have been made in writing, over the signature of a duly authorized officer of the said defendant corporation.

VI.

That the property described in said policy of in-

insurance and destroyed in said fire was a total loss, having been completely destroyed and no part thereof being saved from the fire, either wholly or partially.

VII.

That plaintiff's damage under the terms of said policy of insurance was the sum of twenty-five hundred (\$2500.00) dollars, the full amount thereof.

Wherefore plaintiff prays judgment against defendant for the sum of twenty-five hundred (\$2500.00) dollars; together with interest thereon from the 18th day of April, 1906, at the rate of 7% per annum, together with costs.

LUCIUS L. SOLOMONS,

Attorney for Plaintiff.

State of California,

City and County of San Francisco,—ss.

Leon Willard, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the same and knows the contents thereof. That the same is true of his own knowledge except as to the matters therein stated on his information and belief; and as to those matters, he believes it to be true.

LEON WILLARD.

Subscribed and sworn to before me this 12th day of July, 1906.

[Notarial Seal]

JAMES M. ELLIS,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jul. 12, 1906. H. I. Mulcrevy,
Clerk. By L. J. Welch, Deputy Clerk.

*In the Superior Court of the State of California, in
and for the Superior Court of the City and
County of San Francisco.*

Department No. ———.

LEON WILLARD, Doing Business Under the Firm
Name of LEON WILLARD & CO.,

Plaintiff,

vs.

WILLIAMSBURGH CITY FIRE INS. COMPANY
(a Corporation),

Defendant.

Summons on Complaint in Superior Court.

Action brought in the Superior Court, City and
County of San Francisco, State of California,
and the Complaint filed in the office of the Clerk
of said City and County of San Francisco.

LUCIUS L. SOLOMONS,

Attorney for Plaintiff,

The People of the State of California, Send Greeting
to Williamsburg City Fire Insurance Company
(a Corporation), Defendant:

You are hereby directed to appear and answer the
complaint in an action entitled as above brought
against you in the Superior Court of the City and
County of San Francisco, State of California, within
ten days after the service on you of this Summons—

if served within this County; or within thirty days if served elsewhere.

And you are hereby notified that, unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract or will apply to the Court for any further relief demanded in the complaint.

Given under my hand and the Seal of the Superior Court at City and County of San Francisco, State of California, this 12 day of July, A. D. 1906.

[Seal]

H. I. MULCREVY,
Clerk.

By L. J. Welch,
Deputy Clerk.

In the Superior Court of the City and County of San Francisco, State of California.

LEON WILLARD, Doing Business Under the Firm Name of LEON WILLARD & CO.,
Plaintiff,

vs.

WILLIAMSBURGH CITY FIRE INSURANCE
COMPANY OF BROOKLYN, NEW YORK
(a Corporation),

Defendant.

Demurrer to Complaint in Superior Court.

Now comes the defendant above named and demurring to the complaint on file herein, for cause of its demurrer avers:

I.

That the said complaint does not state facts sufficient to constitute a cause of action.

Wherefore, said defendant prays that it be hence dismissed with its costs.

VAN NESS & DENMAN,
Attorneys for Defendant.

[Endorsed]: Filed Jul. 21, 1906. H. I. Mulcrevy,
Clerk. By Jas. P. Kane, Deputy Clerk.

*In the Superior Court of the City and County of San
Francisco, State of California.*

LEON WILLARD, Doing Business Under the Firm
Name of LEON WILLARD & CO.,
Plaintiff,

vs.

WILLIAMSBURGH CITY FIRE INSURANCE
COMPANY OF BROOKLYN, NEW YORK,
(a Corporation),

Defendant.

**Petition for Removal of Cause to United States Cir-
cuit Court.**

Petition for Removal of Cause to United States Cir-
cuit Court, Ninth Circuit, in and for the North-
ern District of California, on the Ground of
Diverse Citizenship.

To the Honorable, the Superior Court of the City and
County of San Francisco:

Your petitioner respectfully shows to this Honor-
able Court that it is the defendant in the above-en-

titled suit; that said suit was heretofore brought by the said plaintiff in this Court; that summons was issued therein and served with a copy of the complaint upon your petitioner; that the time has not elapsed wherein your petitioner is allowed under the practice and laws of the State of California and the rules of this Court to appear, plead, demur or answer to said complaint; that the said plaintiff was at the time of the commencement of the said suit and still is a citizen of the State of California; and that your petitioner then was and still is a citizen of and a corporation duly organized and existing under the laws of the State of New York.

Your petitioner further represents that the said action above entitled was brought at common law by the said plaintiff for the purpose of recovering more than the sum of two thousand (\$2,000) dollars, which the plaintiff alleges is owed to them by the defendant by virtue of the alleged non-performance on the part of the defendant of its certain contract of insurance made with the plaintiff, insuring plaintiff's interest in certain property in the City and County of San Francisco, State of California, against loss by fire, which said complainant alleges was destroyed by fire, whereby said alleged liability of the defendant to the plaintiff arose; that your petitioner denies said alleged liability and disputes said claim; and that the matter in dispute in said action exceeds the sum and value of two thousand (\$2,000) dollars, exclusive of interest and costs.

Your petitioner further shows that it has herewith filed its demurrer in said action, and offers herewith

its bond with good and sufficient security as required by Section 3 of the Act of Congress of March 3d, 1887, that it will, on or before the first day of the next ensuing session of the United States Circuit Court, Ninth Circuit, in and for the Northern District of California, enter and file therein a transcript of the record of this action and for the payment of all costs which may be awarded by said Court, if the said Circuit Court shall hold that this suit was wrongfully or improperly removed thereto; and that your petitioner desires to remove said cause into the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California, pursuant to said Statute.

Your petitioner therefore prays that this petition and said bond may be accepted by this Court, and that the said suit may be moved into the next Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California, pursuant to said Statute in said case made and provided, and that a transcript of the record herein be directed to be made as provided by law, and that no further proceedings be had therein in this Court.

And your petitioner will ever pray.

VAN NESS & DENMAN,
Attorneys for Petitioner.

[Endorsed]: Due service of the within Petition is hereby admitted this 20th day of July, 1906.

LUCIUS L. SOLOMONS,
Attorney for Plaintiff.

Filed Jul. 21, 1906. H. I. Mulerevy, Clerk. By Jas. P. Kane, Deputy Clerk.

Bond on Removal of Cause to Circuit Court.

Know All Men by These Presents: That the Williamsburgh City Fire Insurance Company of Brooklyn, New York, as principal, and the National Surety Company, a corporation duly organized and existing and doing business under and by virtue of the laws of the State of New York, as surety, are held and firmly bound unto Leon Willard, doing business under the firm name of Leon Willard & Company, in the penal sum of five hundred (500) dollars, gold coin of the United States, for the payment whereof, well and truly to be made unto the said Leon Willard, doing business under the firm name of Leon Willard & Company, his heirs and assigns, we bind ourselves, our heirs, representatives and assigns, jointly and severally, by these presents.

Nevertheless, upon these conditions: That the said Williamsburgh City Fire Insurance Company of Brooklyn, New York, having petitioned the Superior Court of the City and County of San Francisco, State of California, for the removal of a certain cause therein pending, wherein the said Leon Willard, doing business under the firm name of Leon Willard & Company, is plaintiff, and the Williamsburgh City Fire Insurance Company of Brooklyn, New York, is the defendant, to the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

Now, if the said Williamsburgh City Fire Insurance Company of Brooklyn, New York, shall enter

in the said Court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by the said Circuit Court of the United States, if such court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to remain in full force and virtue.

In witness whereof, we have hereunto affixed our hands this 20 day of July, A. D. 1906.

WILLIAMSBURGH CITY FIRE INS. CO.

By EDWARD E. POTTER,

Genl. Agt.

[Seal] NATIONAL SURETY COMPANY,

By FRANK L. GILBERT,

Attorney in Fact.

[Endorsed]: Filed Jul. 21, 1906. H. I. Mulcrevy,
Clerk. By Jas. P. Kane, Deputy Clerk.

*In the Superior Court of the City and County of
San Francisco. State of California.*

LEON WILLARD, Doing Business Under the Firm
Name of LEON WILLARD & COMPANY,
Plaintiff,

vs.

WILLIAMSBURGH CITY FIRE INSURANCE
COMPANY OF BROOKLYN, NEW
YORK (a Corporation),

Defendant.

Order for Removal of Cause to Circuit Court.

It appearing that the defendant has filed its petition for removal of this cause to the United States Circuit Court, Ninth Circuit, in and for the Northern District of California, in accordance with the law therefor provided, and that defendant has filed its bond duly conditioned with good and sufficient surety as provided by law, and it appearing to the Court that this is a proper cause for removal to said Circuit Court,

Now, therefore, it is hereby ordered, adjudged and decreed that the said petition and bond is hereby accepted, and that this cause be and it is hereby removed to the United States Circuit Court, Ninth Circuit, in and for the Northern District of California, and the clerk is hereby directed to make up a copy of the record in said cause for transmission to said court forthwith.

Done in open court this 21st day of July, 1906.

[Seal]

THOS. F. GRAHAM,

Presiding Judge.

[Endorsed]: Filed Jul. 21, 1906. H. I. Mulerevy,
Clerk. By Jas. P. Kane, Deputy Clerk.

County Clerk's Certificate to Record.

I, H. I. Mulerevy, County Clerk of the City and County of San Francisco, State of California, and ex-officio Clerk of the Superior Court, in and for said city and county, hereby certify the foregoing to be a full, true and correct copy of the original

record in re Leon Willard, doing business, etc., vs. Williamsburgh City Fire Ins. Co., in the above-entitled cause on file in my office on the 25th day of October, A. D. 1906.

Attest my hand and seal of said Court, this 25th day of October, 1906.

[Seal]

H. I. MULCREVY,
Clerk.

By J. J. Greif,
Deputy Clerk.

No. 1128.

[Endorsed]: Transferred Record. Filed Oct. 27, 1906. Southard Hoffman, Clerk. By W. B. Mal-
ing, Deputy Clerk.

At a stated term, to wit, the November term, A. D. 1906, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday the 5th day of November, in the year of our Lord one thousand nine hundred and seven. Present: The Honorable CHARLES E. WOLVERTON, District Judge District of Oregon designated to hold and holding this court.

No. 14039.

LEON WILLARD etc.

vs.

WILLIAMSBURGH CITY FIRE INS. CO.

Order Overruling Demurrer to Complaint, etc.

Ordered defendant's demurrer to the complaint herein be and the same hereby is overruled, with leave to defendant to answer herein within twenty days.

In the Circuit Court of the United States, Ninth Circuit in and for the Northern District of California.

No. 14,039.

LEON WILLARD, Doing Business Under the Firm
Name of LEON WILLARD & COMPANY,
Plaintiff,

vs.

WILLIAMSBURGH CITY FIRE INSURANCE
COMPANY (a Corporation),
Defendant.

Answer.

Now comes the defendant and answering unto the complaint of plaintiff admits, denies and alleges as follows:

Defendant says that it has no information or belief upon the subject sufficient to enable it to answer the allegation of the complaint that at the time of the issuance of the policy in this action sued upon the insured upon said policy was, as alleged in the complaint, or otherwise, or at all, interested in, or the owner of, the property mentioned in the complaint and in said policy, and for that reason and upon that

ground denies that at said time, or at any time, said insured was, as alleged in the complaint, or otherwise, or at all, interested in, or the owner of, said property, or had any interest, or ownership, in said property.

Defendant denies that defendant did insure said insured, or did undertake to make good to said insured such direct loss or damage as said insured might suffer by or from fire to the property in the policy and complaint described except as in and under the terms and conditions of the policy sued on, and in that behalf defendant alleges that in and by said policy it was provided by and between said insured and defendant, and was stipulated and agreed, that defendant should not be liable under said policy for any greater proportion of such loss than the amount insured under said policy should bear to the whole insurance thereon, whether valid or not, and defendant alleges that if liable at all to plaintiff, it is liable for only such portion of the loss suffered by the insured under said policy as the insurance by it written under said policy bore and bears to the whole insurance upon said property.

And defendant says that it has no information or belief upon the subject sufficient to enable it to answer the allegation of the complaint that at the time of the fire alleged in the complaint, or as alleged in the complaint, the insured under said policy was interested in, or the owner of, said property; and for that reason and upon that ground denies that at said time, or at any time, said insured was as alleged in

the complaint, or otherwise, or at all, interested in, or the owner of said property, or had any interest in, or ownership of, said property.

And defendant says that it has no information or belief upon the subject sufficient to enable it to answer the allegation of the complaint that by the fire mentioned in the complaint, or that by reason of said fire, the property described in the complaint, and in the policy of insurance in this action sued upon, was damaged and destroyed, or damaged or destroyed, to the damage and injury, or damage or injury, of the insured under said policy as alleged in the complaint, and that the loss of the said insured by reason of said fire and such damage or destruction was the sum or amount of money mentioned in the complaint, and for that reason and upon the ground denies that the said property was damaged and destroyed, or damaged or destroyed, by reason of such fire as alleged in said complaint, or that the loss of said insured, or damage to said insured, by reason of such fire, was the sum or amount of money mentioned in the complaint, or the sum of money sued for in this action, or any sum of money; and defendant denies that said fire, or that the loss mentioned in the complaint, was not directly or indirectly caused by earthquake, or was not occasioned by or through, or was not caused by earthquake, but upon the contrary alleges that said fire was occasioned by and through and was caused by earthquake, and that but for the earthquake the fire and loss mentioned in the complaint would not have occurred.

And defendant denies that there is due or owing from defendant the sum sued for in this action, or any sum, and denies that there is any sum due from defendant under and by virtue of said policy of insurance, or otherwise, or at all. Defendant denies that the loss complained of by plaintiff, and for recovery of which this action is brought, was directly caused by fire or was a direct loss by fire, but upon the contrary defendant alleges that said loss was occasioned by and through and was caused by earthquake as otherwise and elsewhere in this answer set forth; and that but for such earthquake said loss would not have occurred.

Further answering unto the complaint of plaintiff, defendant alleges:

That in and by the policy of insurance in this action sued upon it was provided by and between the insured under the policy sued on and defendant, and it was stipulated and agreed that the defendant company should not be liable for loss occasioned by or through earthquake; and defendant alleges the fact to be that the fire mentioned in the complaint, and the loss thereby and by reason thereof in the complaint specified and alleged was occasioned by earthquake and through earthquake, and that but for such earthquake said fire and said loss would not have occurred.

Further answering unto the complaint of plaintiff, defendant alleges:

That in and by the policy of insurance in this action sued upon it was provided by and between the

insured under the policy sued on and defendant, and it was stipulated and agreed, that the defendant company should not be liable for loss occasioned by or through earthquake; and defendant alleges the fact to be that the fire mentioned in the complaint and the loss thereby, and by reason thereof, in the complaint specified and alleged, was caused by earthquake and through earthquake, and that but for such earthquake said fire and said loss would not have occurred.

Wherefore defendant prays that plaintiff take nothing by this action, and that defendant have judgment for its costs of suit herein.

VAN NESS & DENMAN,
Attorneys for Defendant.

State of California,
City and County of San Francisco,—ss.

E. E. Potter; being first duly sworn, deposes and says: That he is an officer of the defendant corporation, namely, the general agent thereof; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters he believes it to be true.

E. E. POTTER.

Subscribed and sworn to before me this 23d day of November, 1906.

[Seal] CEDA DE ZALDO,
Notary Public in and for the City and County of
San Francisco, State of California.

Due service and receipt of a copy of the within Answer is hereby admitted this 26th day of November, 1906.

L. L. SOLOMONS,
Attorney for Plaintiff.

[Endorsed]: Answer. Filed Nov. 26, 1906. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit in and for the Northern District of California.

No. 14,039.

LEON WILLARD, Doing Business Under the Firm
Name of LEON WILLARD & COMPANY,
Plaintiff,

vs.

WILLIAMSBURGH CITY FIRE INSURANCE
COMPANY (a Corporation),
Defendant.

Verdict of the Jury.

We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of twenty-seven hundred and seventeen 78 dollars.

CHAS. E. PAXTON,
Foreman.

[Endorsed]: Filed Nov. 13, 1907. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 14,039.

LEON WILLARD, Doing Business Under the Firm
Name of LEON WILLARD & COMPANY,
Plaintiff,

vs.

WILLIAMSBURGH CITY FIRE INSURANCE
COMPANY (a Corporation),
Defendant.

Judgment.

This cause having come on regularly for trial upon the 12th day of November, 1907, being a day in the November, 1907, term of said court, Lucius L. Solomons and L. A. Redman, Esqs., having appeared as attorneys for plaintiff, and H. B. M. Miller and A. D. Plaw, Esqs., having appeared as attorneys for defendant, and a jury of twelve men having been impaneled and sworn to try the issues joined herein and the trial having been proceeded with on the 13th day of November, 1907, and the plaintiff by its attorneys having moved the Court to instruct the jury to return a verdict in favor of plaintiff, and the Court having instructed the jury to return a verdict in favor of the plaintiff in the sum of two thousand seven hundred seventeen and $78/100$ dollars, and the jury under said instruction having returned the following verdict which was recorded, viz: "We, the

jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of twenty-seven hundred and seventeen 78 dollars. (Sgd.) Chas. E. Paxton, Foreman''; and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Leon Willard, doing business under the firm name of Leon Willard & Company, plaintiff, do have and recover of and from the Williamsburgh City Fire Insurance Company, a corporation, defendant, the sum of two thousand seven hundred seventeen and 78/100 (\$2,717.78) dollars, together with its costs in this behalf expended, taxed at \$49.60.

Judgment entered November 13, 1907.

SOUTHARD HOFFMAN,

Clerk.

A true copy:

[Seal] Attest: SOUTHARD HOFFMAN,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

[Endorsed]: Filed November 13, 1907. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

No. 14,039.

LEON WILLARD etc.

vs.

WILLIAMSBURGH CITY FIRE INSURANCE
CO.

Clerk's Certificate to Judgment-Roll.

I, Southard Hoffman, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court, this 13th day of November, 1907.

[Seal]

SOUTHARD HOFFMAN,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

[Endorsed]: Judgment-roll. Filed November 13, 1907. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

LEON WILLARD, Doing Business Under the Firm Name of LEON WILLARD & CO.,
Plaintiff,

vs.

WILLIAMSBURGH CITY FIRE INSURANCE COMPANY (a Corporation),
Defendant.

Bill of Exceptions.

Be it remembered: That on Tuesday, the 12th day of November, 1907, the above-entitled action came on for trial before the Honorable W. C. Van Fleet, Judge of the above-entitled court, sitting with a jury, the plaintiff in said action appearing by L. L. Solomons, Esq., and L. A. Redman, Esq., its attorneys, and the defendant in said action appearing by T. C. Van Ness, Esq., and H. B. M. Miller, Esq., its attorneys, and the following proceedings were had:

Prior to the opening statement of counsel defendant admitted to be true each and every allegation in the complaint in the action in which suit was originally brought under policy numbered 2,765,082, covering property located as in the complaint alleged at 738 Mission Street, with the exception of the allegation contained in paragraph VII thereof, defendant denying any and all liability to plaintiff under policy of insurance issued, defendant claiming that the fire

mentioned in plaintiff's complaint and plaintiff's alleged loss was occasioned by and through earthquake. Defendant's said policy *in* the words and figures following:

Policy of Insurance.

No. 2765082.

\$2,500.

THE WILLIAMSBURGH CITY
FIRE INSURANCE COMPANY
of Brooklyn, New York.

IN CONSIDERATION of the stipulations herein named and of Dollars Premium, does insure Leon Willard & Company for the term of one year from the 29th day of September, 1905, at noon, to the 29th day of September, 1906, at noon, AGAINST ALL DIRECT LOSS OR DAMAGE BY FIRE, EXCEPT AS HEREINAFTER PROVIDED, to an amount not exceeding \$2500 to the following described property while located and contained as described herein, and not elsewhere, to wit:

AS PER SLIP HERETO ATTACHED.

\$2500. On stock of Fancy goods, laces, cloaks, wraps and perfumery and other similar merchandise, their own, or held by them in trust or on commission, or sold, but not delivered, all while contained in the brick building situate No. 738 North side of Mission Street, between Third and Fourth Streets, San Francisco, California.

It is understood that Leon Willard is the assured under this Policy, doing business under the name of Leon Willard and Company.

This slip is hereby made a part of policy No. 2765082, issued to Leon Willard and Company by the Williamsburgh City Fire Insurance Company. San Francisco, September 29th, 1905.

(Signed) EDWARD E. POTTER,
General Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there

can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment, and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property, and be or become encumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given

of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto), for use therein; or if (any usage or custom of trade or manufacture to the contrary, notwithstanding) there be kept, used, or allowed on the above-described premises benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus, or petroleum, or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied, and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or for loss or damage occasioned by or through any volcano,

earthquake or hurricane, or other eruption, convulsion, or disturbance; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy, it shall be a

part of this contract and a warranty by the insured.

In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal, or this policy shall be void.

This policy shall be cancelled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is cancelled by this company by giving notice it shall retain only the *pro rata* premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its

proportion of any loss and of the value of property remaining in the original location shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to his company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all encumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in

the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described, and the several parts thereof were occupied at the time of the fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then

estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part, relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss may be provided for by agreement or condition written hereon, or attached or appended hereto. Liability for reinsurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this

policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached.

Thereupon the opening statement on behalf of the defendant was made as follows:

Opening Statement on Behalf of Defendant.

Mr. MILLER.—Gentlemen of the Jury: In order that we may thoroughly understand this matter before proceeding with the testimony, I want to make to you a short statement in regard to it.

This is a suit upon a policy of insurance, brought by Leon Willard against the Williamsburgh City Fire Insurance Company, to recover the sum of \$2,500, claimed to be their loss under the policy of insurance issued to them. We admit that the policy in question was issued by the defendant. We admit that the property was destroyed by fire, but we say that in consequence of a provision in our policy which exempted us from any liability to you because of a fire caused by earthquake, we don't owe you anything. That is our position in the matter, gentlemen. In our answer we have set out that in and by the policy of insurance in this action sued upon, it was provided by and between the insured, under the policy sued on, and the defendant, and it was stipulated and agreed, that the defendant com-

pany should not be liable for loss occasioned by or through earthquake; and defendant alleges the fact to be that the fire mentioned in the complaint, and the loss thereby, and by reason thereof, in the complaint specified and alleged, was occasioned by earthquake and through earthquake; and that but for such earthquake said fire and said loss would not have occurred. That is our position in this matter.

We will show to you, gentlemen, that the policy of insurance which was issued by the insurance company to Mr. Willard contained that plain provision; that he took that policy of insurance with that provision in it.

We will show to you, gentlemen, that on the morning of the 18th of April, 1906, an earthquake occurred in the city and county of San Francisco, one of a very great severity. We will prove to you by a Government official here in this city, whose duty it was, or at least a part of whose duty it was, to observe earthquakes and make records of them, that the earthquake which occurred here on that day was one of the severest earthquakes that are classified. We will show to you that among scientific men earthquakes are classified in classes from one to ten. That class one is an earthquake that is the least felt; in fact, it would not be felt at all by the ordinary person, and could only be observed by means of the very fine instruments that are used. Class two is a little more severe; class three still more severe, and finally when they get up to class ten, that is the severest

earthquake of which these scientific men have any records.

We will show to you, gentlemen of the jury, that here in San Francisco the earthquake ran from eight up to ten; in other words, that it was one of very great severity.

We will show to you, in addition to that, that a large amount of damage was done in this city by means of that earthquake. We will show to you that buildings were disrupted, some of them torn apart; others fell; and that the streets even, in many instances, were thrown out of shape. We will show to you that the railroad companies in San Francisco, the electric railroads and the cable railroads, were simply put out of business in consequence of the severity of that quake. We will show to you that the gas companies and the electric companies in San Francisco were virtually put out of business because of the severity of that earthquake. We will put men on the stand, gentlemen, and will have them explain to you how this city is supplied with gas and electricity, the immense number of electric wires extending all over this city, and the large number of gas pipes extending all over this city, through the streets and in the houses. We will show to you, gentlemen, instances where those electric wires were so disturbed as to cause what are called short-circuits. We will also prove to you that short-circuits will produce fire. We will show to you by witnesses who are familiar with the condition of this city, as to its electric wiring and as to the gaspipes extending throughout it, that conditions at that time were such as reason-

ably to cause fires. We will show all of those things, gentlemen, and we will ask you then, after it has been proved to you as I have stated, to say whether or not the earthquake in this case caused the fire.

In addition to that we will prove further to you that on the morning of the 18th day of April, 1906, within 10 or 15 minutes of the time of the earthquake, a large number of fires immediately broke out. We will show to you that one man, on one of the hills here in San Francisco, within 15 or 20 minutes after the earthquake, observed in various parts of this city from 15 to, I believe, 25 different fires. We will show to you that another gentlemen in another part of the city, on one of the hills, observed some 8 or 10 different fires; and all of these fires breaking out within a very few minutes of the earthquake.

In addition to that we will also show you that not only did these fires break out within a few minutes, but that the firemen when called to attend to these fires and to extinguish them, found the water-mains broken and that they could not get any water with which to put them out. We will show to you that that was the general condition throughout this city, and that in the majority of cases where they went to fires they were unable to get any water with which to put them out. We will also show to you, gentlemen, that in cases where they were able to get the water to put them out, they did succeed in extinguishing them. Those things will be shown to you, and there we will ask you, were those fires not caused by the earthquake?

And further in this respect we will show you, gentlemen, that there was in this city at the time of that earthquake, what was known as a fire-alarm system, a system by means of which knowledge of a fire could be communicated at once to the fire-alarm office to all the fire department places, wherever they might be. That that was done by means of fire-alarm boxes on the streets, which a person could go to and pull down a lever and notice of the fire would be given right at once to the fire-alarm office, and that office then by means of some appliances that they would have would immediately communicate to the fire department, first to the portion of the department in the particular locality where this fire was; if the fire was of such a character that the one district could not manage it, then it would be communicated to the adjoining one, and so on until finally when it would come to a general alarm the entire fire department could be brought out.

We will show to you that by reason of this earthquake that fire alarm department was also put out of business and there were no means of communicating to the fire department the fact that there was a fire at any place. Those things will also be shown to you.

So that taking all of the conditions together, taking the damage done to the streets, taking the damage done to the buildings throughout the city, taking the damage done to the railroads and the gas and the electric companies, we will ask you then, after we have shown you all of these facts whether or not the fire in question was not caused by earthquake.

But we will not stop at that, gentlemen. While we will show you those conditions, we will not stop there. We will go further. We will show to you, gentlemen, that a fire started on the corner of Third and Howard Streets, in a Chinese washhouse; that that fire started within a very few minutes of the time of the earthquake; that it was caused by the collapsing of that Chinese washhouse, and some of the rafters and other boards in the house falling over a hot stove; and that within a very few minutes after the earthquake that place was on fire. We will also show to you that the fire department was called out to put out that fire, and when they got there there was no water, and they could not do so. We will show to you that the Captain of the particular district that went there then sent for the chemical engine, and had that brought over there with the idea of putting the fire out, but was unable to do so. We will prove to you, gentlemen, that that fire, starting right next to the corner, or within a very few feet of the corner of Third and Howard streets, on the south side of Howard street and the east side of Third street— I say we will prove to you that that fire started in and burned east and south and north; that it came across Howard street and burned on up Third street, clear up until it got to Market.

We will show to you, in addition to that, that another fire was started on Natoma street, on the north side of Natoma street, within a very few feet of Fourth street. We will show that that fire started by reason of the falling of the back end of the building

there. We will bring gentlemen here to you who will tell you that they saw that fire almost immediately after the falling of the building. We will bring a man who was in that house—a roomer in that house—who barely had time to get out. We will show to you there that that fire started in consequence of the earthquake. Then we will follow that fire up, from the north side of Natoma street near Fourth, to the south side of Minna street, from the south side of Minna street to the north side of Minna street, from the north side of Minna street to the south side of Mission street, and from the south side of Mission street to the north side of Mission street and the property of the plaintiff in this action.

We will go still further. We will show to you, gentlemen, that a fire was started in a saloon belonging to a man by the name of Moriarity, on the northwest corner of Minna and Third streets. We will show to you that within a very few minutes after that earthquake one of the witnesses saw a portion of the brick wall of this building cave in, a gas pipe extending out of it broken off, with fire going out of that gaspipe, as she stated, making a terrible fire. We will show to you that that occurred within a very few minutes after this earthquake. We will take that fire, gentlemen, and we will follow it up along the west side of Third street, up to Mission, to the south side of Mission, across the south side of Mission to the north side of Mission and to the property of the plaintiff in this case.

When we have shown to you these facts we will then ask you whether or not the fire in this case was

caused by the earthquake. There will be many witnesses to prove these facts, and probably there will be many other facts of detail that will be brought out in the evidence that I have not spoken about now. The only thing I desire at this time to do is simply to give to you a general idea of the line of proof that we are going to introduce, and that is as I have stated it to you.

Thereupon the following proceedings were had :

Motion for a Verdict for Plaintiff, etc.

Mr. REDMAN.—If your Honor please, the plaintiff, at this time moves that your Honor direct the jury to return a verdict for the plaintiff upon the ground that, assuming the facts to be as stated by counsel for defendant, defendant is not entitled to a verdict in that it clearly appears from his statement that this loss was indirectly and not directly due to the earthquake. And we request your Honor to give us an opportunity to argue that at some little length.

Thereupon and after argument upon the motion made by plaintiff the following proceeding was had :

The COURT.—It is only necessary for me to suggest that I am satisfied, upon the whole, with the general course of reasoning of Judge Whitson as to the construction to be put upon this clause. Now, that does not mean, and I do not suppose Judge Whitson means, that either one of the two features of the clause standing by itself would not be construed precisely as the defendant contends for; that is, the clause “by or through earthquake” is as broad, standing by itself and unrestricted by other lan-

guage, as the clause "caused directly or indirectly by earthquake." But in the peculiar phraseology in which this clause in this class of policies is couched, I think that Judge Whitson's conclusion is correct, that the defendant has itself limited the interpretation to be put upon that second clause, so that a loss to fall within that clause must arise from a fire which originates on the premises where the loss occurs. It was suggested this morning that that language of Judge Whitson was not necessary to a decision of that case, but it is strictly so; it is essential to sustain the ruling that he made sustaining the demurrer as to that second defense. While, as I say, and as Judge Whitson suggests, the question is not entirely free from doubt, yet for practical purposes judicial action must be based upon a conclusion reasonably certain, although the Judgment of the Court may be beset by some degree of uncertainty and applying that rule I am satisfied that I would not be justified in postponing a declaration of my conclusion simply because the subject is open to some conceivable doubt. I shall, therefore, grant the motion of the plaintiff and instruct the jury to bring in a verdict for the plaintiff.

Mr. MILLER.—We ask for an exception.

The COURT.—Certainly.

Thereupon the Court directed the jury to render a verdict for the plaintiff and against the defendant for the sum of \$2,500, with interest thereon at the rate of 7 per cent per annum from the 16th day of August, 1906, to the present time.

Defendant then and there and before the jury retired to consider upon the verdict duly excepted to said direction and instruction of said Court, which said exception was then and there duly allowed by said Court.

And thereafter the jury returned a verdict in favor of the plaintiff and against the defendant in the sum of \$2717.78.

T. C. VAN NESS,
Attorney for Defendant.

The settlement of the foregoing Bill of Exceptions having been regularly continued to the present term of Court, to wit, the term commencing Monday, November 4th, 1907, and said Bill of Exceptions having been correctly engrossed as settled, it is hereby stipulated and agreed that said Bill of Exceptions may be presented to the Judge who tried the above-entitled case and settled, certified and allowed as engrossed.

L. L. SOLOMONS,
Attorney for Plaintiff.

T. C. VAN NESS,
Attorney for Defendant.

Order Settling, Certifying and Allowing Bill of Exceptions.

The settlement of the foregoing Bill of Exceptions having been regularly continued to the November term of the above-entitled Court, to wit, the term commencing Monday, November 4th, 1907, and said Bill of Exceptions having been stipulated to being correctly engrossed as settled, and being now pre-

sented in due time and found to be correct, the same is hereby settled, certified and allowed as a true Bill of Exceptions taken upon the trial herein.

W. C. VAN FLEET,
Judge.

Dated Feby. 7, 1908.

Due service and receipt of a copy of the within Bill of Exceptions, is hereby admitted this 26th day of December, 1907.

L. L. SOLOMONS,
Attorney for Plff.

[Endorsed]: Filed February 7, 1908. Southard Hoffman, Clerk. J. S. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

No. 14,039.

LEON WILLARD, Doing Business Under the Firm
Name of LEON WILLARD & COMPANY,
Plaintiff,

vs.

WILLIAMSBURGH CITY FIRE INSURANCE
COMPANY (a Corporation),
Defendant.

Petition for Writ of Error.

Williamsburgh City Fire Insurance Company (a corporation), the defendant above named, feeling itself aggrieved by the verdict of the jury and the judgment entered thereupon on the 13th day of No-

vember, 1907, whereby it was adjudged that the plaintiff have and recover from the defendant the sum of twenty-seven hundred and seventeen and 78/100 (2717.78) dollars, comes now by T. C. Van Ness, its attorney, and petitions said Court for an order allowing it, said defendant, to prosecute a writ of error to the United States Circuit Court of Appeals in and for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of a supersedeas bond which the defendant shall give and furnish upon said writ of error and that upon the giving of said bond all further proceedings in this Court be suspended, stayed and superseded until the determination of said writ of error by the said United States Circuit Court of Appeals in and for the Ninth Circuit.

And your petitioner will ever pray, etc.

T. C. VAN NESS,

Its Attorney.

[Endorsed]: Filed March 5, 1908. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

No. 14,039.

LEON WILLARD, Doing Business Under the Firm Name of LEON WILLARD & COMPANY,

Plaintiff,

vs.

WILLIAMSBURGH CITY FIRE INSURANCE COMPANY (a Corporation),

Defendant.

Assignment of Errors.

Now comes Williamsburgh City Fire Insurance Company (a corporation), the defendant in the above-entitled action, by T. C. Van Ness, its attorney, and specifies the following as errors upon which it will urge its writ of error in the above-entitled action, to wit:

I.

That the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California, erred in directing the jury to render a verdict in favor of the plaintiff and against the defendant.

II.

Upon the calling of the above-entitled cause for trial, and after the jury was impaneled, counsel for

defendant made the following opening statement to the Court and Jury:

The defendant's defense was based upon a provision of the policy of insurance pleaded in defendant's answer, which said provision was that said defendant should not be liable for loss occasioned by or through earthquake; that in said answer defendant alleged the fact to be that the fire mentioned in the complaint, and the loss thereby, and by reason thereof, was occasioned by earthquake and through earthquake, and that but for such earthquake said fire and said loss would not have occurred; that to sustain the defense based upon said provision of the policy, defendant would prove by the testimony of witnesses the following facts:

That certain fires were caused by earthquake in certain buildings other than the building in which the goods insured were located and contained; that said fires, or one or more thereof, so caused, spread from building to building, and from block to block, until said fires, or one or more thereof, so caused, reached the building in which the property insured was contained, and destroyed said property.

Immediately after said statement of counsel for defendant was made, and upon the motion of counsel for plaintiff, and before any witnesses for defendant were called, the Court instructed the jury to render a verdict in favor of the plaintiff and against the defendant.

Defendant hereby assigns as error the action of the Circuit Court of the United States, Ninth Circuit in

and for the Northern District of California, in so directing the jury to bring in a verdict in favor of the plaintiff and against the defendant.

III.

That said Court erred in entering the judgment herein in favor of the plaintiff and against the defendant.

And defendant prays that the judgment of said Circuit Court entered herein in favor of the plaintiff and against the defendant be reversed by reason and because of the errors herein set forth in this assignment of errors.

T. C. VAN NESS,

Attorney for Williamsburgh City Fire Insurance
Company, a Corporation.

[Endorsed]: Filed March 5, 1908. Southard
Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

No. 14,039.

LEON WILLARD, Doing Business Under the
Firm Name of LEON WILLARD & COM-
PANY.

Plaintiff.

vs.

WILLIAMSBURGH CITY FIRE INSURANCE
COMPANY (a Corporation),

Defendant.

Order Allowing Writ of Error, etc.

Upon motion of T. C. Van Ness, attorney for the defendant in the above-entitled action, and upon the filing of the petition for writ of error and assignment of errors:

It is ordered that a writ of error as prayed for in said petition be allowed, and that the amount of the supersedeas bond to be given by defendant upon said writ of error be and the same is hereby fixed at the sum of four thousand (4,000.00) dollars, and that upon the giving of said bond all further proceedings in this court be suspended, stayed and superseded pending the determination of said writ of error by the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated March 5th, 1908.

W. C. VAN FLEET,

Judge.

[Endorsed]: Filed March 5, 1908. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

No. 14,039.

LEON WILLARD, Doing Business Under the Firm Name of LEON WILLARD & COMPANY,

Plaintiff,

vs.

WILLIAMSBURGH CITY FIRE INSURANCE PANY (a Corporation),

Defendant.

Bond on Writ of Error.

Know all men by these presents: That we, the Williamsburgh City Fire Insurance Company (a corporation), as principal, and National Surety Company of New York (a corporation), as surety, are held and firmly bound unto the plaintiff in the above-entitled action in the sum of four thousand (4,000.00) dollars, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our, and each of our successors, representatives, and assigns, firmly by these presents.

Sealed with our seals and dated this 5th day of March, 1908.

Whereas, the above-named defendant, Williamsburgh City Fire Insurance Company (a corporation), has sued out a writ of error in the United

States Circuit Court of Appeals in and for the Ninth Circuit to reverse the judgment entered in the above-entitled action in favor of the plaintiff therein and against the defendant therein, for the sum of twenty-seven hundred and seventeen and 78/100 (2717.78) dollars, interest and costs.

Now, therefore, the condition of this obligation is such, that if the above-named, Williamsburgh City Fire Insurance Company (a corporation), shall prosecute such writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

WILLIAMSBURGH CITY FIRE INSURANCE COMPANY (a Corporation),

By T. C. VAN NESS,

Its Attorney.

[Seal National Surety Company]

NATIONAL SURETY COMPANY,

By FRANK L. GILBERT,

Resident Vice-President.

A. E. OBERG,

Resident Asst. Secretary.

Approved this 5th day of March, 1908.

W. C. VAN FLEET,

Judge.

[Endorsed]: Filed March 5, 1908. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 14,039.

LEON WILLARD, Doing Business Under the
Firm Name of LEON WILLARD & CO.,
Plaintiff,

vs.

WILLIAMSBURGH CITY FIRE INS. COM-
PANY (a Corporation),

Defendant.

Clerk's Certificate to Transcript of Record.

I, Southard Hoffman, clerk of the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing forty-nine (49) pages, numbered from 1 to 49, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitutes the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$28.00; that said amount was paid by T. C. Van Ness, attorney for the above-named defendant; and that the original writ of error and citation issued in said cause are hereto annexed.

In testimony whereof, I have hereunto set my

hand and affixed the seal of said Circuit Court, this 3d day of April, A. D. 1908.

[Seal] SOUTHARD HOFFMAN,
Clerk of United States Circuit Court, Northern Dis-
trict of California.

Writ of Error (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States, To the Honorable, the Judges of the Circuit Court of the United States for the Ninth Circuit, Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Williamsburgh City Fire Insurance Company (a corporation), plaintiff in error, and Leon Willard, doing business under the firm name of Leon Willard & Company, defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the

4th day of April next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the fifth day of March, in the year of our Lord one thousand nine hundred and eight.

[Seal] SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States for
the Ninth Circuit, Northern District of California.

Allowed by

W. C. VAN FLEET,
Judge.

Service of within writ and receipt of a copy thereof is hereby admitted this 5th day of March, 1908.

LUCIUS L. SOLOMONS,
Attorney for Defendant in Error.

The Answer of the Judges of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at

the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

SOUTHARD HOFFMAN,

Clerk.

[Endorsed]: Original. No. 14,039. Circuit Court of the United States, Ninth Circuit, Northern District of California. Williamsburgh City Fire Insurance Company (a Corporation), Plaintiff in Error, vs. Leon Willard, Doing Business Under the Firm Name of Leon Willard & Company, Defendant in Error. Writ of Error. Filed March 5th, 1908. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

Citation on Writ of Error (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Leon Willard, Doing Business Under the Firm Name of Leon Willard & Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Circuit Court of the United States, for the Northern District of California, wherein Williamsburgh City Fire Insurance Company (a corporation), is plaintiff in error.

and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness, the Honorable WM. C. VAN FLEET, United States District Judge, for the Northern District of California, this 5th day of March, A. D. 1908.

W. C. VAN FLEET,
United States District Judge.

Due service and receipt of a copy of the within Citation is hereby admitted this 5th day of March, 1908.

LUCIUS L. SOLOMONS,
Attorney for Defendant in Error.

[Endorsed]: No. 14,039. Williamsburgh City Fire Insurance Company (a Corporation), Plaintiff in Error, vs. Leon Willard, Doing Business Under the Firm Name of Leon Willard & Company, Defendant in Error. Citation on Writ of Error. Filed March 5th, 1908. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. T. C. Van Ness, Counsellor and Attorney-at-Law, Kohl Bldg., San Francisco, Cal.

[Endorsed]: No. 1586. United States Circuit Court of Appeals for the Ninth Circuit. The Williamsburgh City Fire Insurance Company (a Corporation), Plaintiff in Error, vs. Leon Willard, Doing Business Under the Firm Name of Leon Willard & Company, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Northern District of California.

Filed April 3, 1908.

F. D. MONCKTON,
Clerk.

